person or property. Hence there was no consciousness of such an obligation as is present in the case under consideration.[16]

The statement has been made that if the tenant remains on the premises after they become defective his recovery is barred by contributory negligence.[17] This is true where the danger is so imminent that no prudent man would remain on the premises unrepaired, and also where the landlord refuses to make the repairs.[18] But where the danger is such that a man of ordinary intelligence would consider it avoidable by proper care without removing from the premises, and where the landlord, upon notice, signifies his intention to make the repairs, or perhaps where he expresses no intention on the subject, the tenant's remaining on the premises would not seem to bar recovery, for two reasons: First, the landlord should not be heard to plead in defense to his own breach of duty that the tenant accepted his assurance that the obligation would be met, and acted on that hypothesis; secondly, the case would seem to be analogous to that where a promise by a master to repair a defective tool or appliance destroys the effect of the servant's assumption of risk usually consequent upon his user of the tool or appliance with knowledge of the defect. Upon notice the landlord undertakes the specific duty of repairing that defect, and the question of assumption of risk by the tenant does not arise.[19]

A late authority on negligence,[20] after stating that the law on this question is in a state of transition, gives the true rule to be as follows: Where there is a covenant on the part of the landlord to keep the premises in a safe and tenantable condition, and he has knowledge or notice of such defects as render the use of the premises in the manner contemplated by the lease dangerous to the tenant, and the tenant suffers personal injuries therefrom after a reasonable time for making the repairs, in the absence of contributory negligence the landlord is liable in an action of tort therefor, the covenant being set up as a matter of inducement.

RIGHTS OF ADJOINING LANDOWNERS IN PERCOLATING WATERS.—A review of the decisions relating to this subject reveals a woeful lack of harmony; there is probably no branch of the law in which one will find greater inconsistency and diversity of judicial opinion.

As to what are percolating waters, it may be said that in contemplation of law all waters, whether surface or subterranean, are either flowing or percolating. In the latter class are placed all sub-

[16] Galveston, etc., Ry. Co. *v.* Hennigan, 33 Tex. Civ. App. 314, 76 S. W. 452.

[17] Schick *v.* Fleischhauer, *supra.*

[18] Hamilton *v.* Feary, *supra.*

[19] Stilwell *v.* South Louisville Land Co., *supra.* See also, Neglia *v.* Lielouka, 32 Misc. 707, 65 N. Y. Supp. 500.

[20] SHEARMAN & REDFIELD, NEGLIGENCE, 6 ed., § 708a. See also, 1 THOMPSON, NEGLIGENCE, § 1141.

terranean waters that are composed of vagrant, itinerant drops, wandering hither and thither along the line of least resistance and in accordance with the law of gravity. They are such waters as have no well defined nor easily ascertainable sources or channels and whose existence is of an ephemeral nature.[1] When subterranean waters move in known, definite, and well defined channels, the rights incident to them are practically the same as those inhering in surface waters.[2]

The law respecting the rights of property owners in percolating waters is of comparatively recent development. The first English case bearing directly upon the subject was that of *Acton* v. *Blundell*.[3] In this case the court held that where one by an excavation on his own land draws off the percolating waters from the land of another to the prejudice of the latter, the law can give to the aggrieved party no redress for his injury. This decision antedates any authoritative American case upon the subject.

In England the doctrine laid down in *Acton* v. *Blundell, supra,* has been uniformly sustained by a long line of decisions and has become settled law. In 1895 the House of Lords, in *Mayor of Bradford* v. *Pickle,*[4] not only affirmed the doctrine adhered to in earlier cases, but went to the extent of holding that the motive or purpose of the defendant was immaterial. Consequently in England at the present day one can tap and draw off, either openly or clandestinely, the water stored in a neighbor's land without incurring liability or restraint, regardless of how sinister or malicious his motives may be, or how substantial or serious an injury may be inflicted on the other person. Such cases are said to involve *damnum absque injuria.*

In America the decisions of the courts of the various States are greatly in conflict. In the beginning some of our courts exhibited a tendency to apply the English rule and to hold that a landowner has an absolute, unqualified, and indefeasible right in all waters that may be found percolating beneath his soil. As a corollary, he had a right to use such waters as he saw fit, and this right could not be restrained or curtailed, even when exercised with malevolent motives.[5] But at present, Vermont and Wisconsin seem to be the only States in which this rule is applied.[6]

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[1] Hathorn *v.* Dr. Strong's Saratoga Springs Sanitarium, 55 Misc. 445, 106 N. Y. Supp. 553; Pence *v.* Carney, 58 W. Va. 296, 52 S. E. 702.

[2] Burroughs *v.* Saterlee, 67 Iowa 396, 25 N. W. 808; Whetstone *v.* Bowser, 29 Pa. St. 59; Tampa W. W. Co. *v.* Cline, 37 Fla. 586, 20 So. 780.

[3] 12 M. & W. 324, 13 L. J. Exch. 81.

[4] A. C. 587.

[5] Phelps *v.* Nowlen, 72 N. Y. 39, 28 Am. Rep. 93; Chatfield *v.* Wilson, 28 Vt. 49.

[6] Chatfield *v.* Wilson, *supra;* Huber *v.* Merkel, 117 Wis. 355, 94 N. W. 354. According to Mr. James Barr Ames, in thirteen out of the fifteen jurisdictions in which the question has arisen, the malevolent draining of a well or spring has been held a tort. 18 HARV. LAW REV. 415.

In several of the States the rule obtains that the liability of one who appropriates the percolating waters of an adjacent landowner turns upon the questions of malice and negligence. If the defendant exercise due care, or if his motives be proper, he is thereby legally exculpated, no matter how great an injury he may inflict on the plaintiff.[7]

During the last two or three decades, however, the courts in a great majority of the United States have mitigated to a considerable extent the rigor of the English rule. The modern trend of authority is decidedly in favor of the establishment of correlative rights in percolating waters. In accordance with this view the doctrine of "reasonable user" has been laid down, a doctrine that is continually growing in favor, as is evidenced by the most recent decisions. As a result, the ancient maxim of the common law, *sic utere tuo ut alienum non laedas,* has been given a wider extension.

The principle is now fairly well established in the United States that where two or more persons are distinct owners of parts of an area overlying a stratum saturated with percolating waters, correlative rights arise of such a substantial nature as to come within the cognizance and protection of the law.[8] On this principle rests the doctrine of "reasonable user." The gist of this doctrine is that no one of such landowners has an absolute and unqualified property in the waters to be found percolating in his soil, such as he possesses in the soil itself. On the contrary, in his enjoyment of such waters he must have regard to the correlative rights of his neighbors. He may not withdraw such waters for wanton destruction or for sale when the reasonable use of another is thereby restricted or his property rights substantially impaired.[9] What constitutes a reasonable use is held to be a question of fact, to be determined from the circumstances of each particular case.[10] In the case of *Katz* v. *Walkinshaw*[11] the court stated in unequivocal language that the common-law doctrine that the owner of land is the absolute owner of percolating waters beneath his land could not be equitably applied to the State of California and that such a rule was not adopted in that State as a part of the English common law. In the case of *Meeker* v. *City of East Orange*[12] the court expressly repudiated the English rule as to absolute, unqualified property rights in percolating waters and substituted therefor the doctrine of "reasonable user."

Of late years many cases have arisen where landowners have suffered great detriment because of the installation of machinery on adjoining lands for the purpose of bringing to the surface the per-

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[7] Miller *v.* Black Rock Springs, etc., Co., 99 Va. 747, 40 S. E. 27, 7 VA. LAW REG. 556; St. Amand *v.* Lehman, 120 Ga. 253, 47 S. E. 949.

[8] Miller *v.* Bay Cities Water Co., 157 Cal. 256, 107 Pac. 115; Erickson *v.* Crookston Water Works, etc., Co., 100 Minn. 481, 111 N. W. 391.

[9] Ross Common Water Co. *v.* Blue Mountain Consol. Water Co., 228 Pa. St. 235, 77 Atl. 446; Erickson *v.* Crookston Waterworks, etc., Co., *supra;* Pence *v.* Carney, *supra.*

[10] Erickston *v.* Crookston Waterworks, etc., Co., *supra.*

[11] 141 Cal. 116, 74 Pac. 766. [12] 77 N. J. L. 623, 74 Atl. 379.

colating waters contained in extensive strata, the water to be used not merely for domestic purposes but to be made an article of merchandise. When artificial force of a "pervasive and potential reach" is thus employed to drain the subsurface of its moisture, the courts are practically unanimous in giving damages to the injured party and restraining by injunction a continuance of the wrong.[13] Where both of the adjoining landowners employ artificial force and use the water for commercial purposes, it is held that neither has cause for complaint.[14]

A great many cases arise, also, where landowners are disturbed in the enjoyment of the percolating waters of their soils through acts done on adjoining lands, such acts being done in the course of effecting a proper object and with no intention of injuring the rights of others, as where one is lawfully employed in blasting or making excavations. The majority of the courts hold that liability in such cases depends on whether or not the work was done in a negligent manner.[15] A recent case of this nature is that of *Patrick* v. *Smith* (Wash.), 134 Pac. 1076, in which it was held that the plaintiff was entitled without proof of negligence to recover damages from the defendant, who had caused a depletion of the water in the former's well by the vibrations resulting from blasting for a railroad cut. According to the rule set up in this case, the motive prompting the act and the manner in which the act is done are alike immaterial, liability being incurred in the absence of either or both. Whether the path blazed by this decision will be extensively followed in other States is a matter of conjecture; it diverges considerably from that marked out by the decided weight of authority.

The law upon the subject of percolating waters may be summarized as follows:

(1) In two States a landowner enjoys an absolute property right in the percolating waters of his soil, and the motive that actuates him in appropriating them is immaterial.

(2) In a few States the presence of malice or negligence transforms what is *damnum absque injuria* into *damnum cum injuria.*

(3) In a great majority of the States correlative rights are recognized and the doctrine of "reasonable user" prevails.

It would seem that the doctrine of "reasonable user" is eminently just and sound. The courts that apply this rule found their decisions on logical reasoning and the elementary principles that differentiate right from wrong. The English rule has become repugnant

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[13] Burr *v.* Maclay Rancho Water Co., 160 Cal. 268, 116 Pac. 715; Smith *v.* Brooklyn, 160 N. Y. 357, 54 N. E. 787; Forbell *v.* New York, 164 N. Y. 522, 58 N. E. 644; Hathorn *v.* Dr. Strong's Saratoga Sorings Sanitarium, *supra.*

[14] Merrick Water Co. *v.* City of Brooklyn, 32 App. Div. 454, 53 N. Y. Supp. 10.

[15] Wasioto & B. M. R. Co. *v.* Hensley, 148 Ky. 366, 146 S. W. 751; Haldeman *v.* Buckhart, 45 Pa. St. 514, 84 Am. Dec. 511.

to our conception of a proper equipoise of justice, for American courts realize that it is but an application of the vicious and barbarous maxim that "might makes right." [16] They recognize, moreover, the absurdity of holding that A has an absolute and indefeasible property in the waters of Whiteacre and the right to withdraw them *ad libitum,* when B, the owner of the adjoining Blackacre, may at any moment wrest them from him and leave him without redress.[17] They question how there can be an absolute property right held by such a doubtful and precarious tenure; and they make a distinction between the existence of an absolute right and the total absence of any right that the law will recognize and protect.

The reason advanced in support of the more rigid rule as to percolating waters was said to be based on the fact that their movements are so screened from observation and so little known that no proof concerning them could be satisfactory. However, the researches of science have thrown so much light upon the subject that proof concerning percolating waters may in most cases be almost as convincing and satisfactory as that relating to surface waters.[18]

It has been said, too, that, should the English rule be not adopted, such an element of uncertainty would be injected into property rights as to unsettle them, and hamper landowners in the development of their property. The reasoning on which this contention reposes is näive and faulty. It is submitted that, instead of having such an effect, the more liberal rule serves to protect the rights of the owner of realty by eliminating fortuities that in some cases might encompass his financial ruin.[19]

LIABILITY TO ADJOINING LANDOWNERS FOR DAMAGE BY VIBRATION OF EARTH AND AIR.—Where one in blasting on his own premises and for a lawful purpose, hurls rocks, earth and other flying debris on the premises of another, it is ***damnum cum injuria*** and the Courts have agreed in holding the defendant liable whether he was negligent or not.[1]

This is but another illustration of the familiar principle that where an act lawful in itself may naturally result in legal injury to another, the actor must at his peril see to it that the injury does not occur, or else must expect to respond in damages. Undoubtedly

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[16] Katz *v.* Walkinshaw, *supra;* Meeker *v.* City of East Orange, *supra.*
[17] Meeker *v.* City of East Orange, *supra.*
[18] Meeker *v.* City of East Orange, *supra;* Hathorn *v.* Dr. Strong's Saratoga Springs Sanitarium, *supra.*
[19] Katz *v.* Walkinshaw, *supra;* Meeker *v.* City of East Orange, *supra.*
[1] Hay *v.* Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279; G. B. & L. Co. *v.* Eagles, 9 Colo. 544, 13 Pac. 696; Tiffin *v.* McCormick, 34 Ohio St. 638, 32 Am. Rep. 408; Carman *v.* Ry. Co., 4 Ohio St. 399; Langhorne *v.* Turman, 141 Ky. 809, 133 S. W. 1008.